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No. 90-1625 (12)

In the

Supreme Court of the United States

OCTOBER TERM, 1990

THE PEOPLE OF THE STATE OF CALIFORNIA,
Petitioner,

vs.

HODARI D.,
Respondent.

ON WRIT OF CERTIORARI
TO THE COURT OF APPEAL OF CALIFORNIA
FOR THE FIRST APPELLATE DISTRICT

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE IN SUPPORT OF THE RESPONDENT

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QUESTIONS PRESENTED

I.

WHETHER THE RESPONDENT WAS "SEIZED" WITHIN THE MEANING OF THE FOURTH AMENDMENT BECAUSE, IN VIEW OF ALL OF THE CIRCUMSTANCES SURROUNDING THE INCIDENT, A REASONABLE PERSON WOULD HAVE BELIEVED THAT HE WAS NOT FREE TO LEAVE.

II.

WHETHER THE EVIDENCE SEIZED WAS "FRUIT OF THE POISONOUS TREE".

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INTEREST OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

The National Association of Criminal Defense Lawyers, Inc. (NACDL) is a District of Columbia non-profit corporation with a nationwide membership of more than five thousand lawyers who are citizens of every state. Members include state and federal judges, advocates, and law professors, whose positions bring them into daily contact with the criminal justice system. Tne NACDL is the only national bar organization working on behalf of public and private defense lawyers. The American Bar Association recognizes the NACDL as an affiliated organization and awards it full representation in the ABA House of Delegates. The NACDL, founded more than twenty-five years ago, is dedicated to the preservation and improvement of our adversary system of justice.

The Amicus Curiae Committee of the NACDL has concluded that the issues in this case are of such importance that the NACDL seeks to offer its assistance to the Court. Both the petitioner and the respondent have consented to participation by NACDL as amicus curiae and their written consent has been filed with the Court.

SUMMARY OF ARGUMENT

A police officer ran directly toward the respondent, blocking his path, admittedly to stop him, at which time the respondent discarded incriminating evidence. The California Court of Appeal held that the respondent was "seized" within the meaning of the Fourth Amendment before he discarded the evidence because in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave. Applying, *inter alia*, this Court's decision in *Michigan v. Chesternut*, 486 U.S. 567, 108 S.Ct. 1975 (1988), the Court of Appeal

reasoned that the police conduct would have communicated to the reasonable person an attempt to capture or otherwise intrude upon the respondent's freedom. That the officer possessed no reasonable and articulable suspicion that the respondent had done anything wrong was not disputed by the petitioner in the California Court of Appeal. Finding no such reasonable and articulable suspicion, the Court of Appeal held that the seizure was violative of the Fourth Amendment. Because the act of discarding was the direct and proximate result of the illegality, the Court of Appeal ordered suppression.

The petitioner proposes various new tests for determining when a person has been "seized" for the purposes of the Fourth Amendment. These tests are fashioned so as to remove the police conduct in the case at bar from the ambit of the Fourth Amendment. The Court should reject, as it did in *Chesternut*, any bright-line approaches to Fourth Amendment investigatory stop issues. The case at bar was properly resolved below by the application of the necessarily flexible tests designed by this Court to address the varied factual scenarios presented by Fourth Amendment "seizure" issues. Consequently, this Court should approve the lower court's application of the proper legal standards to the fact-specific circumstances of this case. *Minnesota v. Olson*, ___ U.S. ___, 110 S.Ct. 1684, 1690 (1990).

Similarly, the Court of Appeal properly applied this Court's decisions regarding "fruit of the poisonous tree" in finding suppression warranted because the challenged evidence was obtained as a direct result of the illegal detention.

In so ruling, California, like other states, has sought to shield its citizens from unjustified intrusions by the police. The ruling sought by the petitioner would not only

undermine that state interest, but would also unwisely limit this Court's authority to review police-citizen encounters.

ARGUMENT

I.

THE RESPONDENT WAS "SEIZED" WITHIN THE MEANING OF THE FOURTH AMENDMENT BECAUSE, IN VIEW OF ALL OF THE CIRCUMSTANCES SURROUNDING THE INCIDENT, A REASONABLE PERSON WOULD HAVE BELIEVED THAT HE WAS NOT FREE TO LEAVE.

A. This Court's Decision In *Chesternut* Mandates Affirmance.

The petitioner argues that the Court should adopt a rule that Fourth Amendment protections can never be afforded an individual in the absence of actual physical control obtained by the police through the use of force or display of authority. The petitioner's bright-line approach is no more palatable now than when it was urged in *Michigan v. Chesternut*, 486 U.S. 567, 108 S.Ct. 1975, 1979 (1988), where the Court chastised the parties for having

> failed to heed this Court's clear direction that any assessment as to whether police conduct amounts to a seizure implicating the Fourth Amendment must take into account " 'all the circumstances surrounding the incident' " in each individual case. *INS v. Delgado*, 466 U.S. 210, 215, 104 S.Ct. 1758, 1762, 80 L.Ed.2d 247 (1984), quoting *United States v. Mendenhall*, 446 U.S. 544, 554, 100 S.Ct. 1870, 1877, 64 L.Ed.2d 497 (1980) (opinion of Stewart, J.).

Accordingly, the Court refused in *Chesternut* to adopt either the petitioner's argument that the Fourth Amendment is never implicated until an individual stops in response to a police show of authority, or the respondent's argument that all police "chases" are Fourth Amendment seizures. Instead, the Court measured the particular facts in *Chesternut* against the holding in *Terry v. Ohio*, 392 U.S. 1, 19 n. 16, 88 S.Ct. 1868, 1979 n. 16, 20 L.Ed.2d 889 (1968) ("Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred."), and the *Terry*-based "objective" test announced in *United States v. Mendenhall, supra*, and later embraced by the Court. See *INS v. Delgado*, 466 U.S. at 215, 104 S.Ct., at 1762. See also *Florida v. Royer*, 460 U.S. 491, 502, 103 S.Ct. 1319, 1326-27, 75 L.Ed.2d 229 (1983) (plurality opinion); *id.*, at 514 (BLACKMUN, J., dissenting). That test provides that an individual is seized within the meaning of the Fourth Amendment "only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *Chesternut*, 108 S.Ct., at 1979, quoting *Mendenhall*, 446 U.S. at 554, 100 S.Ct., at 1877.

Applying these holdings to the facts in *Chesternut*, the Court found no seizure where a police car was merely driving parallel to the running defendant, reasoning as follows:

> [T]he police conduct involved here would not have communicated to the reasonable person an attempt to capture or otherwise intrude upon respondent's freedom of movement.

Chesternut, 108 S.Ct., at 1980. The Court added:

> Without more, the police conduct here — a brief acceleration to catch up with respondent, followed by a short drive alongside him — was not "so intimidating" that respondent could reasonably have believed that he was not free to disregard the police presence and go about his business.

Id., at 1981. Although the police conduct in *Chesternut* had been termed a "chase" by the officer and the magistrate, the Court deemed that characterization was insufficient, in and of itself, "to implicate Fourth Amendment protections", *id.*, at 1980, where the record was devoid of any evidence that the respondent would have reasonably perceived an attempt to interfere with his freedom. Thus, the police "were not required to have 'a particularized and objective basis for suspecting [respondent] of criminal activity' in order to pursue him." *Chesternut*, 108 S.Ct., at 1981, quoting *United States v. Cortez*, 449 U.S. 411, 417-418, 101 S.Ct. 690, 694-695, 66 L.Ed.2d 621 (1981).

The facts in the case at bar are materially different. In running toward and blocking the path of the respondent, the officer's actions spoke louder than words, carrying the unambiguous message that the respondent could not proceed and the officer was about to seize him. At the suppression hearing, the officer testified that he intended to cut off the respondent and stop him.[1] There can be no doubt

[1]Although the uncommunicated subjective intent of the officer does not determine whether a Fourth Amendment seizure has taken place, see *Chesternut*, 108 S.Ct., at 1980 n. 7, unlike in *Chesternut*, where it was nevertheless deemed noteworthy that the goal of the officer was "not to capture the respondent but to see where he was going", *id.*, *cf. Mendenhall, supra*, 446 U.S. at 575, nn. 12-13 (WHITE, J., dissenting), here, it is noteworthy that the officer's admitted goal was to stop the respondent and question him.

The lower state courts in *Chesternut* found a seizure relying upon *People v. Terrell*, 77 Mich. App. 676, 259 N.W. 2d 187 (1977), and *People v. Shabaz*, 424 Mich. 42, 378 N.W. 2d 451 (1985), cert. dismissed, 478 U.S. 1017, 106 S.Ct. 3326, 92 L.Ed.2d 733 (1986), in each of which an officer

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that in this case the officer's conduct amounted to and communicated "an attempt to capture or otherwise intrude upon respondent's freedom of movement." *Chesternut*, 108 S.Ct., at 1980. No reasonable person in the respondent's place would have believed himself "free to disregard the police presence and go about his business." *Id.* Indeed, the respondent was attempting to leave the officer's presence but the officer would not allow it by blocking his path.

The California Court of Appeal followed this Court's "clear direction" that determination of whether police conduct implicates the Fourth Amendment turns upon the circumstances of each individual case. *Chesternut*, 108 S.Ct., at 1979. Accordingly, the court properly applied to the circumstances the objective test of whether the respondent would have reasonably believed he was not free to leave and correctly reached the conclusion that the police conduct in this particular case effected a "seizure" within the meaning of the Fourth Amendment. See *Minnesota v. Olson*, ___ U.S. ___, 110 S.Ct. 1684, 1690 (1990) (state court's fact-specific application of proper legal standard should not be disturbed).

B. The Petitioner's Proposed Tests For "Seizure" Conflict With Various Decisions Of This And Other Courts.

The petitioner argues that *Mendenhall* does not define "seizure" in terms of whether a reasonable person would

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chased the defendant on foot after which the defendant abandoned inculpatory evidence. This Court found *Terrell* and *Shabaz* distinguishable from the facts in *Chesternut* because in *Shabaz*, the state apparently stipulated that the clear object of the chase was to apprehend the defendant, and in *Terrell*, "the goal of that chase appears to have been equally clear." *Chesternut*, 108 S.Ct., at 1980 n. 8. Here, by contrast, the officer blocked the respondent. Furthermore, the officer's intent to seize is indisputable.

believe that he was free to leave. While recognizing that "it has generally been assumed" that *Mendenhall* offers such a definition of "seizure", the petitioner boldly claims that "[t]his view is erroneous." Petitioner's Brief at 17. Instead, the petitioner informs us, the *Mendenhall* test "explicates only the requirement of a show of authority". *Id.* Once *Mendenhall* is so viewed, the petitioner's argument continues, it can then be advanced (without fear of contradiction by *Mendenhall*) that a "seizure" requires actual physical restraint.

It is difficult to believe that *Mendenhall* can be read as not offering a definition of "seized". The Court's language could hardly be clearer:

> We conclude that a person has been "seized" within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave. [footnote omitted] Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled. [citations omitted] In the absence of some such evidence, otherwise inoffensive contact between a member of the public and the police cannot, as a matter of law, amount to a seizure of that person.

Mendenhall, 446 U.S. at 554-55, 100 S.Ct., at 1877. The petitioner's claim that this language defines "show of authority" and not "seizure" is not supported anywhere in

the decision. But without such a tortured reading of *Mendenhall*, the petitioner's argument would fail.

Similarly, the Solicitor General advances a dubious reading of *Mendenhall*, claiming not only that the test is limited to determining whether an initially consensual encounter has transformed into a "seizure", but also that the test applies only to determine whether a "seizure" has occurred where the individual has "remained" in the police presence. Brief of Solicitor General at 13-14.

It is true that the *Mendenhall* test arose in the context of a police-citizen airport encounter. In such cases, where the issue is often whether police conduct has transformed an initially consensual encounter into a "seizure", the objective test is recognized as particularly helpful:

> What has evolved from our cases is a determination that an initially consensual encounter between a police officer and a citizen can be transformed into a seizure or detention within the meaning of the Fourth Amendment, "if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *Mendenhall, supra*, 446 U.S. at 554, 100 S.Ct., at 1877 (footnote omitted); see *Florida v. Royer*, 460 U.S. 491, 502, 103 S.Ct. 1319, 1326, 75 L.Ed.2d 229 (1983) (plurality opinion).

Delgado, 446 U.S. at 215, 104 S.Ct., at 1762. But it does not follow that the *Mendenhall* test applies only to such circumstances or only where the individual has "remained" in the presence of police. If such were the case, then the Court would not have employed the test in *Chesternut*, where there was neither an initially consensual encounter nor an individual who "remained" in the presence of police. *Chesternut* decisively instructs that the *Mendenhall* test is

to be applied broadly to all types of settings and encounters and without regard to how the individual reacts to the police:

> The test is necessarily imprecise, because it is designed to assess the coercive effect of police conduct, taken as a whole, rather than to focus on particular details of that conduct in isolation. Moreover, what constitutes a restraint on liberty prompting a person to conclude that he is not free to "leave" will vary, not only with the particular police conduct at issue, but also with the setting in which the conduct occurs. Compare *United States v. Mendenhall, supra* (considering whether police request to see identification and ticket of individual who stopped upon police's approach constituted seizure), with *INS v. Delgado, supra* (considering whether INS "factory survey" conducted while employees continued to move about constituted seizure of entire work force).

While the test is flexible enough to be applied to the whole range of police conduct in an equally broad range of settings, it calls for consistent application from one police encounter to the next, regardless of the particular individual's response to the actions of the police. The test's objective standard — looking to the reasonable man's interpretation of the conduct in question — allows the police to determine in advance whether the conduct contemplated will implicate the Fourth Amendment. 3 W. LaFave, Search and Seizure § 9.2(h), pp. 407-408 (2d ed. 1987). This "reasonable person" standard also ensures that the scope of the Fourth Amendment protection does not vary with the state of mind of the particular individual being approached.

Chesternut, 108 S.Ct., at 1979-1980. Thus, *Mendenhall* promulgated a test for all settings and is not limited as the petitioner claims.

Even within the context of initially consensual encounters, the petitioner's proposed requirement of actual restraint is problematic. With such a requirement, a consensual encounter would not be transformed into a seizure or detention, even if the circumstances would lead a reasonable person to believe that he was not free to leave, unless the police took some additional step that amounted to imposing physical restraint. Such a result would conflict with the Court's decisions in *Chesternut, Delgado, Royer, Mendenhall* and *Terry*.

The petitioner also proposes the following "alternative" to *Mendenhall*: "A seizure occurs when a person *acquiesces* in what he reasonably believes to be an official display of authority." Petitioner's Brief at 18 (emphasis supplied). The petitioner explains this proposal as follows:

> To amplify further, an officer who approaches a person on the street has not effected a seizure in the narrow physical sense because the person remains physically able to walk away. If he choses [sic] not to do so, his termination of movement is self-imposed. Whether he is seized in the constitutional sense depends upon the motivation for his decision to remain. If he does so because he wishes to cooperate with the officer, it is a consensual encounter and thus no seizure. If the person remains in obedience to what a reasonable person would perceive to be a show of authority, he has been seized under the Fourth Amendment. In the *Mendenhall* context, stationary acquiescence to a show of authority is the hallmark of a seizure.

Petitioner's Brief at 21-22.

As previously noted, the Court explained in *Mendenhall* and *Delgado* that a consensual police-citizen encounter can be transformed into a "seizure" by virtue of police conduct which leads a reasonable person to believe he is not free to leave. But under the petitioner's test, such transforming police conduct would be meaningless because the determinative issue would be whether the citizen "acquiesced", which in turn would depend upon the citizen's "motivation." These new elements lack legal and logical foundations and would spawn a host of new problems all their own. Moreover, if the individual's "motivation" were determinative, then no longer would the courts, police and citizenry have the objective test's assurance "that the scope of the Fourth Amendment protection does not vary with the state of mind of the particular individual being approached.". *Chesternut*, 108 S.Ct., at 1980.

Because the case at bar involves a "blocking" by an officer, an even more compelling case is presented for finding a "seizure" than one involving a "chase". Yet, in addressing chase scenarios, state courts have found that Fourth Amendment protections apply, holding there must be some reasonable and articulable suspicion that criminal activity is afoot in order to justify the chase. See, *e.g., State v. Lemmon*, 318 Md. 365, 568 A.2d 48 (Md.1990) (defendant was "seized" pursuant to Fourth Amendment when he was chased, applying *Chesternut* and *Terry*); *In re D.J.*, 532 A.2d 138, 140 (D.C.Ct.App. 1987) ("By taking up pursuit, the police communicated emphatically to D.J. that he was not free to leave" and a seizure occurred, at the latest, when officer began to chase appellant); *People v. Washington*, 192 Cal.App.3d 1120, 236 Cal.Rptr. 840 (1st Dist.Ct.App. 1987) (Fourth Amendment triggered by chase which made clear to defendant that he was not free to leave and the discarded evidence was fruit of the poisonous tree); *People v. Shabaz*,

supra (defendant was not free to go because he was pursued; "investigatory pursuit and stop" to be measured by *Terry*); *People v. Thomas*, 660 P.2d 1272 (Colo.1983) (en banc) (officers need reasonable suspicion at inception of pursuit and may not rely on facts observed during chase to justify seizure); *Commonwealth v. Thibeau*, 384 Mass. 762, 764, 429 N.E.2d 1009, 1010 (1981) ("Pursuit that appears designed to effect a stop is no less intrusive than a stop itself . . . [A] stop starts when pursuit begins."). Even prior to *Mendenhall*, the same conclusion was reached through application of *Terry*. See *People v. Terrell*, *supra* (officer exited unmarked car and chased defendant on foot after observing defendant stick hand in pocket and run at sight of officer; officer saw defendant drop clear envelope containing brown powder; officer arrested defendant after determining package might contain heroin; "investigatory pursuit" held unlawful seizure, citing *Terry*); *State v. Saia*, 302 So.2d 869 (La.1974), *cert. denied*, 420 U.S. 1008, 95 S.Ct. 1454, 43 L.Ed.2d 767 (1975) (seizure took place when police sprang from their car and overtook the defendant; police cannot approach citizens under circumstances that make it seem that some form of detention is imminent absent reasonable grounds to detain or probable cause), cited with approval by LaFave, *supra* at n.4, p.408, n.225.

Because citizen-police encounters usually involve local officers on patrol, the state courts have also had numerous occasions to address the argument that an individual's flight, without more, provides reasonable and articulable suspicion sufficient to effect a *Terry* investigatory stop. The state courts have overwhelmingly rejected this claim.[3] See *Smith*

[3]Whether the officer in this case possessed a reasonable articulable suspicion of criminal activity is an issue not before the Court. The issue was not raised by the petitioner in seeking certiorari review. Nor did the petitioner raise the issue before the California Court of Appeal, as that court expressly noted. (J.A. 138). Even if the issue had been raised, the

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v. United States, 558 A.2d 312 (D.C.App.1989) (defendant's departure at fast pace from scene upon arrival of plainclothes officers in unmarked car did not provide grounds for *Terry* stop); *Hawkins v. State*, 758 S.W.2d 255, 261 (Tex.Cr.App.1988) (Fourth Amendment violated where actions of officers were "designed to control the direction of appellant's movement by 'closing in' on him in order to detain and question him", distinguishing *Chesternut*); *State v. Epperson*, 237 Kan. 707, 703 P.2d 761 (1985) (no reasonable suspicion when two men appeared startled when they saw approaching police car, and then exited car and started to walk away); *People v. Aldridge*, 35 Cal.3d 473, 674 P.2d 240, 198 Cal.Rptr. 538 (1984) (en banc) (no reasonable suspicion when defendants attempted to avoid police); *McClain v. State*, 408 So.2d 721 (Fla.1st DCA), *pet. for rev. dismissed*, 415 So.2d 1361 (1982) (no reasonable suspicion where defendant's behavior indicated only that he wanted to avoid police); *Kearse v. State*, 384 So.2d 272 (Fla.4th DCA 1980) (no founded suspicion where defendant walked "briskly" away from police car); *Commonwealth v. Barnett*, 484 Pa. 211, 398 A.2d 1019 (1979) (when appellee attempted to leave, officers chased him down the street; police conduct was coercive, unsupported by belief of criminal activity, and weapon "abandoned" by appellee was properly suppressed), citing *Commonwealth v. Jeffries*, 454 Pa. 320, 311 A.2d 914 (1973) (*Terry* violated and "abandoned" property subject to suppression when defendant saw unmarked police car, he "quickened his pace"; officer left car, started to pursue defendant who ran and threw package; officer directed defendant to stand against wall; officer asked other officers to "hold him one minute" while officer retrieved package which contained heroin); *People v. Tebedo*, 81 Mich.App. 535, 265 N.W.2d 406 (1978) (no reasonable suspicion where defendant began running at sight of police car); *State v.*

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overwhelming weight of authority (as noted) would find no such evidence in this case.

Frazier, 88 N.W. 103, 537 P.2d 711 (Ct.App.1975) (no reasonable suspicion where police were summoned to motel for eviction, defendant ran from room and was chased and stopped by police and upon questioning ran again); *People v. Towers*, 49 A.D.2d 839, 373 N.Y.S.2d 593 (1975) (no reasonable suspicion when defendant walked away rapidly while making adjusting motion with his hands in his pocket and looking over his shoulder several times after noticing plainclothes officers). See also *Sibron v. New York*, 392 U.S. 40, 66-67, 88 S.Ct. 1889, 20 L.Ed.2d 917 (1968).

What society deems "reasonable" in the context of the Fourth Amendment may be gleaned from the prevailing view in the state courts. See *California v. Greenwood*, 486 U.S. ___, 108 S.Ct. 1625, 1630 (1988). Similarly, what is deemed police conduct sufficiently offensive or intrusive so as to warrant some evidentiary justification can be gleaned from the state court decisions cited above. Such rulings also advance the interest of the state courts in preventing and discouraging police abuses.[3] Under the petitioner's rule, officers would be authorized to chase, stalk, or otherwise harass an individual whom they could not legally stop. In other contexts involving the constitutional rights of the individual, police officers have been prohibited from doing indirectly that which they cannot do directly. For example, police cannot avoid the requirement of *Payton v. New York*, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 306 (1980) (that a warrant must be obtained to effect an arrest in a person's home) by coercing the arrestee to exit the house. *United States v. Al-Azzawy*, 784 F.2d 890, 892-93 (9th Cir.1985),

[3]The court cautioned in *Commonwealth v. Thibeau*, *supra*, that unless the groundless police chase is forbidden, "the police could turn a hunch into a reasonable suspicion by inducing the conduct justifying the suspicion." See also *State v. Saia*, *supra* ("Police cannot actively create 'street encounters' . . ."). *Cf.*, Baldassano, Valli F., "Police Created Exigencies: Implications for the Fourth Amendment," 37 Syracuse Law Re. 147 (1986).

cert. denied, 476 U.S. 1144, 106 S.Ct. 2255, 90 L.Ed.2d 700 (1986); *United States v. Morgan*, 743 F.2d 1158, 1166-67 (6th Cir.1984), *cert. denied*, 471 U.S. 1061, 105 S.Ct. 2126, 85 L.Ed.2d 490 (1985). Similarly, where the protections of *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) forbid interrogation by the police, they are likewise forbidden from conducting the "functional equivalent" of interrogation including "any words or actions on the part of the police . . . that the police know are reasonably likely to elicit an incriminating response from the suspect." *Rhode Island v. Innis*, 446 U.S. 291, 301, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980). See also *Brewer v. Williams*, 430 U.S. 387, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977). The policy expressed in *Innis* applies with equal force here:

> To limit the ambit of *Miranda* to express questioning would 'place a premium on the ingenuity of the police to devise methods of indirect interrogation, rather than to implement the plain mandate of *Miranda*.'

Innis, 446 U.S. at 299, n.3, quoting *Commonwealth v. Hamilton*, 285 A.2d 172, 174 (Pa.1971).

Whether one believes the petitioner's claim that this case presents facts which occur "almost daily in the Nation's cities", Petitioner's Brief at 9, or the Solicitor General's claim that the ruling in this case "is not likely to make a difference in the analysis or the outcome of most cases", Solicitor General's Brief at 5, the Court should be alert to the police abuses, particularly at the local level, which would undoubtedly follow should the petitioner's rule be adopted.

Nor should the Court fail to consider that if the petitioner's rule were adopted, all instances of egregious or harassing police conduct lacking in actual physical restraint would be immune from review by this Court. The petitioner

acknowledges this serious concern as follows: "If such harassing law enforcement practices should eventually come before this Court, 'there will be time enough then to determine whether different constitutional principles may be applicable.' " [citation omitted] Petitioner's Brief at 46. That, of course, will not be the case if it is held that no Fourth Amendment claim can be made at all in the absence of actual physical restraint. We urge the Court to keep open the avenues of review of police-citizen encounters to ensure compliance with ever-evolving constitutional protections.

C. This Court's Decision In *Brower* Does Not Undermine *Mendenhall*, *Delgado*, Or *Chesternut*.

In further support of its argument that the Court should rule that no "seizure" can take place without actual physical restraint, the petitioner places great reliance upon the following language taken from *Brower v. County of Inyo*, ___ U.S. ___, 109 S.Ct. 1378, 1381 (1990): "Violation of the Fourth Amendment requires an intentional acquisition of physical control." Because *Brower* neither involved the issue presented here, nor addressed (much less repudiated) the objective test of *Mendenhall*, the petitioner's reliance is misplaced.

Brower, a civil rights case, found that the respondents' use of a roadblock to stop Brower's car constituted a seizure withing the meaning of the Fourth Amendment. The Court held:

> [A] roadblock is not just a significant show of authority to induce a voluntary stop, but is designed to produce a stop by physical impact if voluntary compliance does not occur.

109 S.Ct., at 1382. Justice Stevens, with whom Justices Brennan, Marshall, and Blackmun joined, observed in a concurring opinion:

> The Court is unquestionably correct in concluding that respondent's use of a roadblock to stop Brower's car constituted a seizure within the meaning of the Fourth Amendment.

Id., at 1383.

Brower reiterated that " '[w]henever an officer restrains the freedom of a person to walk away, he has seized that person.' " *Id.*, at 1380, quoting *Tennessee v. Garner*, 471 U.S. 1, 7, 105 S.Ct. 1694, 1699, 85 L.Ed.2d 1 (1985). *Garner*, in turn, cited *Mendenhall* to illustrate that "it is not always clear just when minimal police interference becomes a seizure." *Id.*, at 7, 105 S.Ct., at 1699.

Brower does not hold that *only* if there is an actual taking can there be a seizure. *Brower* turned upon *intentional* acquisition of physical control as an element of seizure, as distinguished from *accidental* or *unintentional* control. *Id.*, at 1381. The statement in *Brower* that "[v]iolation of the Fourth Amendment requires an intentional acquisition of physical control", does not mean, as the petitioner claims, that there must literally be an actual taking of the person. *Brower* recognizes that a Fourth Amendment "stop" can be effected by a show of authority. "The pursuing police car sought to stop the suspect only by the show of authority represented by flashing lights and continuing pursuit . . .". *Brower*, 109 S.Ct., at 1381. However, because Brower was stopped by his loss of control of the car and subsequent crash, there was no seizure by intentional governmental conduct. Had Brower stopped in response to the show of authority, the Fourth Amendment would have been triggered. Thus, *Brower* stands for the

proposition that in order to implicate the Fourth Amendment, the governmental termination of freedom of movement must be through means *intentionally* applied. *Brower* does not purport to revise or revoke the standards for evaluating police-citizen encounters relied upon in *Chesternut, Delgado, Mendenhall, Royer* or *Terry*. The two state court decisions that have addressed *Brower* in this context, the decision of the Court of Appeal in the case at bar and the decision in *State v. Lemmon*, 318 Md. 365, 568 A.2d 48 (Md.1990), reached the same conclusion.

The California Court of Appeal in this case was understandably perplexed at the petitioner's reading of *Brower* and concomitant claim that the Fourth Amendment was inapplicable because the officer did not actually stop the respondent, noting that such an approach

> would be contrary to many years of Supreme Court precedent stating that no physical restraint is necessary to constitute a detention. (*Adams v. Williams* (1972) 407 U.S. 143, 146 [involuntary rolling down of vehicle window in response to officer's request denoted a "forcible stop"]; *Terry v. Ohio* (1967) 392 U.S. 1, 19 fn. 16 ["[o]nly when the officer, by means of physical force *or show of authority*, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred."].)

(J.A.135-36) (emphasis by court).[4]

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[4]The Court of Appeal also rejected the argument that because in *Brower* this Court cited *Hester v. United States*, 265 U.S. 57 (1924), the entire Court had adopted the suggestion of the concurring opinion that Fourth Amendment protections are not implicated until the police conduct "achieves a restraining effect." *Chesternut*, 108 S.Ct., at 1981 (KENNEDY, J., concurring). The Court of Appeal correctly reasoned that *Hester* has "no application to illegal detentions, nor does it purport to

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The Court of Appeal correctly perceived the petitioner's reading of *Brower* as conflicting with the holding of *Terry* that a seizure occurs when a citizen's liberty is restrained in some way by means of physical force *or* a show of authority. 392 U.S. at 19 n. 16, 88 S.Ct., at 1879 n. 16. The petitioner argues that because the language in *Terry* provides that the "show of authority" must have "restrained the liberty" of the citizen, actual physical restraint is always required. However, *Terry* does not say that the citizen himself must be physically restrained. A "seizure" has occurred where the show of authority has, "in some way restrained the liberty of the citizen". *Id.* The use of the broad and flexible term "some way" refutes the petitioner's argument that there is only "one way." "Restrained" means limited or restricted. "Liberty" refers to the individual's right to freedom and in a Fourth Amendment context includes one's "liberty interest in proceeding with his itinerary". *United States v. Place*, 462 U.S. 696, 708, 103 S.Ct. 2637, 2645, 77 L.Ed.2d 110 (1983). See also *Florida v. Royer*, 460 U.S. at 498, 103 S.Ct., at 1324 (plurality opinion) (a person approached by police "need not answer any question put to him; indeed, he may decline to listen to the questions at all and may go on his way . . . ."). Here, the respondent was "seized" under the *Terry* test because "in some way", i.e., by the officer running at and blocking the path of the respondent, the respondent's "liberty" interest (in proceeding with his own intinerary) was "restrained" because his freedom of movement was violated when the officer would not let him go on his way. The petitioner's view of *Terry* renders meaningless the right to leave.[5]

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define what constitutes a detention". (J.A. 136). *Hester* was cited in *Brower*, the Court of Appeal stated, "to illustrate its statement that the term 'seizure' could not be applied to an unknowing act". *Id.*

[5]Here again the petitioner's test leads to an absurd result as well as conflict with *United States v. Place, supra*. The petitioner argues: "A

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In *Adams v. Williams*, 407 U.S. 143, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972), an officer on patrol in a high-crime area was advised that a person seated in a nearby vehicle was carrying drugs and had a gun. The officer approached the vehicle and tapped on the window. The officer asked the occupant, Williams, to open the door. When Williams instead rolled down the window, the officer reached in and removed a gun from Williams' waistband. Williams was then arrested for unlawful possession of the gun. Upholding the seizure, the Court held that under *Terry*, the information possessed by the officer was sufficiently reliable "to justify the officer's *forcible stop* of Williams." *Id.*, at 147 (emphasis supplied). See also *United States v. Place*, 462 U.S. at 702-703, 103 S.Ct., at 2642. Even though there was no actual physical control, the police conduct was characterized as a "forcible stop" within the meaning of *Terry*. Thus, the lower court correctly found that both *Adams v. Williams* and *Terry* were at odds with the petitioner's argument.

The result reached below is neither unjust, unduly restrictive, nor difficult to implement. It is not unjust because persons who have done nothing wrong should not be subject to police harassment. Even one who runs from authority should be free to go on his way. It has long been

> a matter of common knowledge that men who are entirely innocent do sometimes fly from the scene of a crime through fear of being apprehended as the guilty parties, or from an unwillingness to appear as

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person with the options of movement which respondent possessed is not in the 'physical control of a police officer, although the officer has blocked the path of that person." Petitioner's Brief at 34. Under this view, an officer could prevent a citizen from proceeding with his itinerary by blocking his path as long as some other "options of movement" were available. Such a rule would undermine one's "liberty interest in proceeding with his itinerary." *United States v. Place*, 462 U.S. at 708, 103 S.Ct., at 2645.

> witnesses. Nor is it true as an accepted axiom of criminal law that "the wicked flee when no man pursueth, but the righteous are as bold as a lion."

Alberty v. United States, 162 U.S. 499, 511, 16 S.Ct. 864, 868, 40 L.Ed. 1051 (1896).[6] See also *Wong Sun v. United States*, 371 U.S. at 483 n. 10, 83 S.Ct., at 415 n. 10. One might also run from a police officer due to fear of harassment, embarrassment (from being homeless, jobless, mentally or physically disabled), or prior brutal or otherwise distasteful experiences with police. The Solicitor General, apparently recognizing that one should be free to run in the absence of wrongful conduct, makes the claim that the "respondent was free throughout — in the sense contemplated by *Terry* — to act as he chose: to remain on the street, to walk away, or even to run." Brief of Solicitor General at 15. But the record proves otherwise. It would be accurate to state that the respondent *should have been* free to remain, walk, or run, but was not, because he was blocked when he tried to exercise that freedom.

Nor is the ruling below unduly restrictive. The degree of police intrusiveness permitted must necessarily be proportional to the quality of information possessed by the officer.[7] In the absence of any evidence whatsoever of

[6]Contrary to *Alberty*, the petitioner argues that the quotation from Proverbs does apply in this criminal case. Petitioner's Brief at 39.

[7]The reasonableness of an intrusion under the Fourth Amendment can be measured by a three-factor assessment: "(i) the public interest served by the seizure, (ii) the nature and scope of the intrusion, and (iii) the objective facts upon which the law enforcement officer relied in light of his knowledge and expertise." *Mendenhall*, 446 U.S. at 561, 100 S.Ct., at 1881 (Powell, J., concurring). Applying these factors in *Mendenhall*, Justice Powell found no unreasonableness because (i) the officers were "carrying out a highly specialized law enforcement operation designed to combat the serious societal threat posed by narcotics distribution", *id.*, (ii) the intrusion was such that "the respondent could
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wrongful conduct, an officer's pursuit and blocking of a person's path with the obvious intent to stop cannot be justified. In such a case, the officer must pursue a less invasive course, if he so desires.

The petitioner asks what a police officer is to do upon seeing a person run away from him. Petitioner's Brief at 40. Whenever an officer of the law sees a person is running away from him, if there is a reasonable articulable suspicion of criminal wrongdoing, the officer is free to conduct an investigatory stop under *Terry*. When, however, a citizen engages in behavior which might arouse the officer's curiosity, but the officer possesses no evidence whatsoever of wrongdoing, as is the case here, the officer, while not free to block, stop and question, does remain free to initiate investigation or surveillance, as long as the person's rights to leave the officer's presence and be let alone are not violated. There might someday be a case where even following or stalking could implicate the Fourth Amendment.[8] The

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not reasonably have felt frightened or isolated from assistance", *id.*; and (iii) the officers' observations indicated reasonable suspicion of illegal activity. By contrast here, (i) the officers were on routine patrol; (ii) the intrusion was such that the respondent could not but feel extremely frightened as evidenced by the officer's testimony that the respondent appeared "startled", and (iii) the officer possessed not a scintilla of evidence of criminal activity. "In the absence of any basis for suspecting appellant of misconduct, the balance between the public interest and appellant's right to personal security and privacy tilts in favor of freedom from police interference." *Brown v. Texas*, 443 U.S. 47, 52, 99 S.Ct. 2637, 2641, 61 L.Ed.2d 357 (1979).

[8]In *In re D.J.*, 532 A.2d 138, 140 n.1 (D.C.CtApp. 1987), the court noted:

> The motions judge found, and the government has conceded at oral argument on appeal, that the *Terry* stop occurred at the commencement of the footrace. D.J. contends that the stop occurred at some unspecified point earlier in the encounter, when, by continually "stalking" his movements in their car, the

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possibility of such a case and countless others further underscores the need to avoid bright-line rules in police-citizen encounter cases. See *INS v. Delgado*, 466 U.S. at 215, 104 S.Ct., at 1762 ("Given the diversity of encounters between police officers and citizens . . . the Court has been cautious in defining the limits imposed by the Fourth Amendment.")

Finally, the ruling, as an application of the objective test, is not difficult to implement. As the Court stated in *Chesternut*: "The test's objective standard — looking to the reasonable man's interpretation of the conduct in question — allows the police to determine in advance whether the conduct contemplated will implicate the Fourth Amendment." 108 S.Ct., at 1980. Officer Pertoso knew in advance that the person he ran into would reasonably believe he was not free to leave. Such police conduct is consistent with Fourth Amendment protections only if the officer possesses some evidence of wrongdoing.

D. The Petitioner's Literal View Of "Seizures" Is Inconsistent With The Rights Protected By The Fourth Amendment.

In placing a literal construction upon the Fourth Amendment by arguing that the word "seizures" connotes actual physical restraint, the petitioner has ignored the history of the amendment and the privacy and personal security rights it seeks to preserve.

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> police led him to reasonably believe that he was not free to leave. It might be difficult to pinpoint exactly when, if ever, during this gradually escalating encounter, a reasonable person would feel he was no longer free to decline contact with the police. Fortunately, we find it unnecessary to do so in order to decide this case. We leave the question open, deciding only that the seizure occurred, *at the latest*, when Sergeant Miller began to give chase on foot.

The privacy right which the respondent sought to exercise was the "right to be let alone" which Justice Brandeis explained in this now familiar passage:

> [The makers of our Constitution] conferred, as against the Government, the right to be let alone — the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.

Olmstead v. United States, 277 U.S. 438, 478-479, 48 S.Ct. 564, 72 L.Ed. 944 (1928) (BRANDEIS, J., dissenting).

Historically, the scope and purpose of the Fourth Amendment's privacy guarantee has never been limited to the terms of the amendment itself. "It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty . . . .". *Boyd v. United States*, 116 U.S.616, 630, 6 S.Ct. 524, 532, 29 L.Ed. 746, 751 (1885).

The respondent's rights to privacy and personal security travelled with him on the public streets. *Terry v. Ohio*, 392 U.S. at 9, 88 S.Ct., at 1873; *Katz v. United States*, 389 U.S. 347, 351, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). "This inestimable right of personal security belongs as much to the citizen on the streets of our cities as to the homeowner closeted in his study to dispose of his secret affairs." *Terry*, 392 U.S. at 8-9, 88 S.Ct., at 1873. The Fourth Amendment protects the right to freedom of movement, see *Terry*, 392 U.S. at 34 (Harlan, J., concurring), and the right to proceed with one's chosen itinerary. *United States v. Place*, 462 U.S. at 708, 103 S.Ct., at 2645.

"Time and again this Court in giving effect to the principle underlying the Fourth Amendment, has refused to place an unduly literal construction upon it." *Olmstead*, 277 U.S. at 476, 48 S.Ct., at 572 (BRANDEIS, J., dissenting). Since *Olmstead*, the Court has remained steadfast in its resolve. For example, the Court eventually rejected the argument that an actual physical trespass is necessary to a finding of an unreasonable search by electronic surveillance. *Katz v. United States, supra*. In *Dunaway v. New York*, 442 U.S. 200, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1979), the Court ruled that even when a suspect's detention does not meet all of the technical elements of a "traditional arrest", probable cause is nevertheless required where the detention in "important respects" is indistinguishable from an arrest. 442 U.S. at 212, 99 S.Ct., at 2256. And in *United States v. Place*, 462 U.S. at 708, 103 S.Ct., at 2645, the Court held that an air traveler who is technically free to leave may still be "effectively restrain[ed]" by the seizure of his luggage.

Even if an actual restraint were required for a "seizure", such took place here, as the lower court found:

> [W]e believe that the facts of the instant case illustrate a situation tantamount to a physical seizure. Appellant, who was running down the sidewalk, had his physical freedom of movement sufficiently blocked by the presence of a police officer, wearing a jacket marked "police", who was 11 feet away and running toward him.

(J.A. 137). This finding is amply supported by the record and should not be disturbed. *Minnesota v. Olson, supra*. Such circumstances give rise to a "seizure" even under the petitioner's tests because the respondent was blocked by the officer at which time the respondent was in the presence of the officer and "remained" in the officer's presence because of threatening and coercive conduct.

II.

THE EVIDENCE SEIZED WAS "FRUIT OF THE POISONOUS TREE".

The Solicitor General claims the following:

> The Court of Appeal determined that the officers recovered the drugs "through exploitation of their illegal activity" and "as a direct result of that action," Pet. App. 18, but that conclusion is mistaken. To begin with, the court did not distinguish between the drugs respondent jettisoned *before* he saw Officer Pertoso, which Officer McColgin retrieved when he retraced respondent's escape route, from the drugs respondent that discarded [sic] *after* he saw Officer Pertoso. That distinction is important since respondent plainly had not been "seized" when he abandoned the bag of crack along his escape route. That bag should not have been suppressed, because the officers did not obtain it as the result of an unlawful seizure of respondent.

Brief of Solicitor General at 16-17.

The facts are not as the Solicitor General states. The record does *not* establish that the respondent "jettisoned" any evidence before he saw Officer Pertoso. When Officer Pertoso ran toward the respondent and startled him, the respondent discarded one cocaine rock. The respondent was not seen in the possession of any of the other drugs found in the bag by Officer McColgin along the route where the individuals had been seen running. The abandonment issue arises with regard to the one discarded rock. The bag and its contents are not at issue.

Applying the "fruit of the poisonous tree" doctrine of *Wong Sun v. United States, supra*, the teachings of *United States v. Crews*, 445 U.S. 463, 470, 100 S.Ct. 1244, 1249, 63 L.Ed.2d 621 (1981) (the exclusionary rule "applies to any 'fruits' of a constitutional violation"), and the factors discussed in *Brown v. Illinois*, 422 U.S. 590, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975) for determining whether evidence obtained was the product of the defendant's free will (e.g., temporal proximity of the illegality to the discovery of the evidence, presence of intervening circumstances, and the purpose and flagrancy of the police misconduct), the Court of Appeal had no difficulty concluding that "the challenged evidence was obtained as a direct result of the illegal detention" warranting suppression (J.A. 143-44), reasoning as follows:

> Where the police illegality involved is running head on at a suspect in an effort to stop him, we cannot see how the suspect's immediate discard of contraband can be anything other than a direct result and exploitation of the illegality. There were no intervening circumstances; the officer's stated purpose in pursuing appellant was to stop him because of a hunch that illegal narcotic activity had taken place. The officer's acts were unfounded, as he admitted he originally saw nothing suspicious other than four Black youths standing near a car. Appellant's act of abandoning the evidence when confronted with the running officer in his path was not a mere coincidence.

(J.A. 142-43). Citing *United States v. Pirolli* 673 F.2d 1200, 1204 (11th Cir. 1982) and *United States v. Beck* 602 F.2d 726, 730 (5th Cir. 1979), the Court of Appeal concluded: "To say the police did not obtain the evidence through exploitation of their illegal activity would be a fiction." *Id.*

Again, as was the case in *Minnesota v. Olson, supra*, the state court has resolved the issue with a "fact-specific application of the proper legal standard." 110 S.Ct., at 1690. The petitioner does not suggest otherwise, but urges adoption of a new rule that absent evidence of a police officer's intent to search, the officer's illegal conduct that prompts an individual to discard incriminating evidence is constitutionally irrelevant. According to the petitioner, such a rule is supported by *Brower v. City of Inyo, supra*, and *Hester v. United States*, 265 U.S. 57, 44 S.Ct. 445, 68 L.Ed. 898 (1924), which is cited in *Brower*.

Brower is inapposite having nothing to do with fruit of the poisonous tree or abandonment. *Hester*, of course, announced the "open fields" doctrine: "[T]he special protection accorded by the Fourth Amendment to the people in their 'persons, houses, papers, and effects,' is not extended to the open fields." 256 U.S. at 59. *Hester* held that there was no unlawful search because the open fields are not protected. No such issue is involved here. Additionally, the facts in *Hester* are distinguishable. The authorities in *Hester* had witnessed incriminating activities before pursuing the defendant. No wrongful conduct by the respondent was first observed in the case at bar. Also, the act of discarding whiskey bottles in *Hester* was not preceded by any illegal government activity, whereas the respondent in the case at bar discarded the rock in direct response to the illegal police conduct. Thus, the abandonment in *Hester* was voluntary whereas the contrary is true here. The only arguably illegal activity in *Hester*, a trespass, occurred *after* the defendant had thrown the bottles. Additional consideration must be given to the era in which *Hester* was decided: "Not surprisingly, the very brief (two paragraphs) opinion in *Hester* does not address the then-nascent fruit-of-the-poisonous-tree doctrine." LaFave, *supra*, § 9.2, n.272.9 (1990 Pocket Part).

The reasoning of the lower court and its reliance upon this Court's decisions in *Wong Sun*, *Brown*, and *Crews* was correct. See also *Taylor v. Alabama*, 457 U.S. 687, 102 S.Ct. 2664, 73 L.Ed.2d 314 (1982); *Dunaway v. New York, supra*. The correctness and reliability of the decision below is underscored by the petitioner's concession of the causal connection between the officer's conduct and the discarding of the evidence as follows:

> We acknowledge that in this case the taking was the result of governmental action, for respondent indisputably abandoned the rock in reaction to the approaching officer.

Petition for a Writ of Certiorari at 27.

The California Court of Appeal also found that under the facts of the case, suppression would further the policy underlying the exclusionary sanction:

> The purpose of the exclusionary rule to deter illegal police conduct is served by our decision. "Incriminating admissions and attempts to dispose of incriminating evidence are common and predictable consequences of illegal arrests and searches, and thus to admit such evidence would encourage such Fourth Amendment violations in future cases." (4 LaFave, Search and Seizure, *op. cit. supra*, § 11.4(j), pp. 450-460.) If the police had no legal ground to obstruct appellant's path, exclusion of the evidence obtained as a direct result of that action serves to deter the repetition of such unfounded detentions.

(J.A. 143).

The ruling below is in complete accord with the decision of this and other courts and should not be disturbed. *Minnesota v. Olson, supra.*

CONCLUSION

The judgment of the California Court of Appeal should be affirmed.

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